

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PORTIA RENEE WHITFIELD,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 267821

Ingham Circuit Court

LC No. 04-001335-FH

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84, following a jury trial. She was sentenced as a second habitual offender, MCL 769.10, to serve concurrent prison terms 30 to 270 months for the unarmed robbery conviction and 30 to 180 months for the assault with intent to do great bodily harm less than murder conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant first argues that it was plainly erroneous for the trial court to give a flight instruction consistent with CJI 2d 4.4, because there was no evidence to support the theory that defendant hid from the police shortly after the assault and robbery were committed. This primary issue has been waived because defense counsel agreed to the instructions both before and after they were given. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Derivatively, defendant argues that defense counsel was constitutionally ineffective for failing to object to the now challenged instruction. We disagree. This assertion of error is unpreserved because the claim was not raised below in a proper request for an evidentiary hearing or in a motion for new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, review is limited to errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600.

As a whole, jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence.

People v Marion, 250 Mich App 446, 448; 647 NW2d 521 (2002). A court must give a requested instruction if there is evidence to support it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

It is well established that evidence of flight is admissible as relevant to a defendant's consciousness of guilt and may result in an inference of guilt. *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). While mere departure from a crime scene is insufficient to support a flight instruction, *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989), this Court has concluded that a flight instruction was properly given when there was evidence to show that the defendant was found hiding in a basement from the investigating officers, *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982).

Here, defense counsel was not constitutionally ineffective because there was sufficient evidence elicited at trial to reasonably infer that defendant was hiding in the basement of her mother's restaurant when the police came to the restaurant. Specifically, a friend of the victim testified that after confronting defendant at the restaurant shortly after the assault and robbery, defendant and her brother "just disappeared" around the time the police arrived. While the police did not find defendant in the restaurant that night, the investigating officers and defendant's mother gave contradictory testimony as to whether the officers were allowed to search and did in fact search the basement. Ultimately, the conflict between these testimonies is best resolved by the jury, which is in a superior position to assess witness credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). However, it can be reasonably inferred from all the evidence adduced that defendant had begun to hide once the police arrived, and that the police were prevented from searching the basement because defendant and her brother were hiding there. Accordingly, defendant's ineffective assistance argument fails because the instruction on flight was proper. Defense counsel cannot be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio